No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INCORPORATED,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

ON PETITION FOR REHEARING EN BANC

Brief of *Amicus Curiae* HR Policy Association
in Support of Macy's, Incorporated, Petition for Rehearing *En Banc*

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INTEREST OF *AMICUS CURIAE*

The HR Policy Association is a public policy advocacy organization representing the chief human resources officers of major employers. The HR Policy Association consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of the HR Policy Association's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive.

HR Policy Association has been actively engaged in addressing the significant legal questions presented by the National Labor Relations Board's ("NLRB" or "the Board") splintered decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011).

This brief was not authored in whole or in part by counsel for a party, and no person or entity has contributed money for the preparation or submission of this brief. This brief was authored and filed with the consent of the counsel of record for Macy's.

SUMMARY OF ARGUMENT

The HR Policy Association submits that Macy's application for *En Banc* review of the Panel's decision in this case should be granted for one or more of the following reasons:

- The Panel did not have the opportunity to apply the Supreme Court's recent decision in *Encino Motorcars, LLC. v. Navarro* 195 L. Ed. 2d 382 (2016). The Court's decision, in that case, expanded and refined the requirements for administrative agencies to meet before they are entitled to judicial deference to their decisions. The decision in *Encino* is particularly relevant to the instant case given the Board's non-existent or minimal explanation of the substantial changes it has made to its bargaining unit determination standards and why such changes should be applied in this case.
- The Board failed to provide a reasoned explanation even under the pre-*Encino* standard for the substantial change in its unit determination criteria, and therefore, the Panel gave improper deference to the Board's decision.
- The Panel made an erroneous conclusion that the Board "clarified – rather than overhauled – its unit determination analysis" in this case. *Macy's, Inc., v. NLRB*, No. 15-60022 (5th Cir. June 2, 2016) (citing *Nestle Dreyer's Ice Cream Co. v. NLRB*, No. 14-2222 (4th Cir. Apr. 26, 2016)). The Board's utilization of the overwhelming community of interest test in unit

determination hearings is clearly a substantial change in the law in this area, and the Board's utilization of such standard in this case was a basis for denying Macy's attempt to expand the petitioned-for unit. No employer to date at the Board decisional level has been able to satisfy this standard when it has attempted to add employers to a petitioned for unit.

- The Board and the Panel failed, as required by this Circuit, in *NLRB v. Purnell's Pride*, 609 F.2d 1153 (5th Cir. 1980) to explain what weight, if any, it gave to the traditional community of interest criteria in finding a partial segment of Macy's Sargus store selling employees to be an appropriate unit.
- The Board and the Panel also made numerous erroneous factual findings and erroneous conclusions of law including the following:
    - The Board and the Panel failed to consider all the relevant facts in the record below, including an analysis of how the petitioned-for employees' interests were significantly distinct and different, if at all, from other Macy's selling employees. The Board's decision on this point is not supported by substantial evidence on review of the record as a whole.
    - The Panel failed to acknowledge evidence that rebuts one of the Board's supposed key points to support its decision – the "finding"

that there had been no meaningful interchange of employees in and out of the Macy's Cosmetics and Fragrance Department. In fact, nine employees of the Macy's store had transferred into and out of the Cosmetics Department, which constituted nearly a quarter of the employees in the requested unit. *See* Brief for Respondent Cross-Petitioner at 34, *Macy's, Inc. v. NLRB*, No. 15-60022 (5th Cir. June 2, 2016). This important fact is not credited in the Panel's decision.

- The Board and the Panel improperly relied on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), to support an erroneous conclusion that the "overwhelming community of interest test" had been regularly utilized by the Board in unit determination decisions prior to the Board's 2011 *Specialty Healthcare* decision.
- The Panel improperly cited *Jewish Hospital Association of Cincinnati*, 223 N.L.R.B. 614 (1976), for the proposition that the Board has utilized the overwhelming community of interest test in unit determination cases for a substantial period of time prior to issuing its *Specialty Healthcare* decision. Even a cursory review of the Board's decision in that case evidences that the Board's traditional sufficiently distinct interest test was utilized in reaching unit determinations, not the overwhelming community of interest test.

- The Board failed to provide a reasoned rationale for why it imported the overwhelming community of interest test from the accretion area to this unit determination case, and the Panel improperly deferred to the Board's flawed and incomplete reasoning on this point. The Panel also evidenced a lack of understanding as to the significance and impact of this "transfer" of the overwhelming community of interest test to initial unit determinations.
- The Panel failed to address the Constitutional conflicts that the Board's new standards present in the unit determination area, including due process and equal protections violations that result from application of the Board's new overwhelming community of interest test.
- The Panel improperly suggested that the impact of Board's unit determination decisions on Macy's operations is not a relevant consideration for the Board and the courts to consider. *Macy's*, slip op. at 16-17.

Finally, the Panel failed to utilize a common sense analysis in reviewing the Board's decision ("Common sense sometimes matters in resolving legal disputes" *S. New Eng. Tel. Co. v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015) (rejecting the reasoning of the Board and declining to enforce its order in a

union demonstration case)). If a common sense review had been engaged in by the Panel, it would have easily concluded that the Board's decision should not have been affirmed. Indeed, the judges in the Circuit can take judicial notice upon visiting any retail department store, similar to the Macy's store in question in this case, that if a small group of cosmetics and fragrance employees can constitute an appropriate unit, there will be multiple selling units throughout the entire store – what's next, the Men's Bow Tie Department? Such a multiplicity of units will lead to continual bargaining, potential work stoppages, and potential jurisdictional disputes between employees in competing bargaining units and the unions that represent them. Simply stated, the Board's decision in this case does not comport with common sense. If a common sense standard can be utilized to analyze labor law questions in the D.C. Circuit, such an approach clearly can also be utilized by this Circuit.

ARGUMENT

I. The Panel Improperly Gave *Chevron*[1] Step-two Deference To The Board's Bargaining Unit Determination, Especially In Light Of The Supreme Court's Recent Holding In *Encino Motorcars, LLC. v. Navarro*

The decision in the *Encino Motorcars* case is particularly relevant to the instant matter given the fact that the Board, by its own admission, developed a

[1] *Chervon USA, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984)

"heightened standard" for parties to meet when contesting petitioned-for units, *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 562 (6th Cir. 2013). This so called heightened standard requires that the Board explain on an expanded and refined basis its rationale and reasoning before it can receive deference by a court. Specifically, the Court in *Encino* stated as follows:

> "Agencies are free to change their existing policies so long as they provide reasoned explanation for the change... the agency must at least display 'awareness that it is changing position' and 'show that there are good reasons for the new policy'… in explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interest that must be taken into account." *Encino*, 195 L. Ed. 2d at 393.

The Board failed, on all accounts, to meet this new standard. It failed to provide a reasoned explanation for why it was transferring the exceedingly high burden of the overwhelming community of interest test, only previously used in accretion cases, to the unit determination area, and why it was only applying such onerous test to parties contesting petitioned-for units. It failed to explain what facts and circumstances required such change. Further, it failed to explain why it

was substantially modifying its traditional community of interest test, including why it was abandoning the sufficiently distinct interest aspect of such test. Further, it failed to take into consideration the impact on such test, especially on employers, subject to National Labor Relations Act ("the Act" or "NLRA") jurisdiction who had relied upon the Board's traditional community of interest test for decades in making organizational decisions.

What the Board did in the *Macy's* case was to apply its new *Specialty Healthcare* approach by implementing a novel two pronged test. The first prong of the Board's new approach only applies to labor organizations and permits the Board to apply a very liberal and flexible standard to approve voting units sought by a union if the petitioned-for employees are "readily identifiable" as a group. *Macy's*, slip op. at 12. This is a substantially different test from its traditional community of interest test that has been applied by the Board for decades. In applying this prong in the instant case, the Board approved a small fragmented unit of cosmetic and fragrance employees in the Macy's store in question.

The second prong of the new approach is a test that is exceedingly different from the first prong test and only applies to parties (generally employers) attempting to add employees to the petitioned-for unit. It was "transferred" without explanation from the Board's accretion cases. The second prong requires opposing parties to establish an almost complete "overlap" of terms and conditions

of employment of the requested employees to be added to the unit to the petitioned-for employees. The Board improperly utilized this second prong to deny Macy's request to expand the petitioned-for unit. Indeed, no employer to date has been successful at the Board decisional level in meeting the overwhelming community of interest onerous test to add employees to a petitioned-for unit.

Finally, the Board and the Panel's finding that this test was utilized prior to 2011 in unit determination cases is simply wrong[2]. In fact, the Board and the Panel's reliance on the *Blue Man Vegas* case for authority is clearly erroneous. *See* Brief for HR Policy Association as Amicus Curiae Supporting Petitioner Cross-Respondent at 26-28, *Macy's v. NLRB*, No. 15-60022 (5th Cir. June 2, 2016).

II. The Board And The Panel Failed To Properly Apply The Law Of The Circuit In Unit Determination Cases

This Circuit has made it clear in *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980) that the Board is required to identify what weight, if any, it gives to traditional community of interest criteria in finding a bargaining unit to be appropriate. The Board made no such finding in its decision in this case. Indeed, there is absolutely no explanation in the Board's decision as to what weight, if any, it gave to the traditional community of interest criteria other than its emphasis

[2] The Panels citation to the *Jewish Hospital Association of Cincinnati* for the proposition that the overwhelming community of interest test had been utilized by the Board in the past is clearly wrong. *See Jewish Hospital Association of Cincinnati*, 223 N.L.R.B. at 617. Even a cursory reading of such decision clearly establishes that the Board used its traditional community of interest test, including the sufficiently distinct interest standard test, in reaching unit determinations in that case.

on the geographic area in which the petitioned-for employees worked, the organizational structure in which they were placed by Macy's, and their alleged lack of interchange with other selling employees in the store. *Macy's*, 361 NLRB No. 4, slip op. at 21-24. Focusing on these factors and ignoring other relevant factors underlines the deficiency of the Board's unit determination holding. For example, in virtually any situation, whether it be a department store or factory, warehouse or a hospital, employees will be performing work in separate geographic areas of the employer's operation. In fact, here, part of the petitioned-for employees did not even work in the same area – they worked on two separate floors. *Macy's*, 361 NLRB No. 4, slip op. at 39. Common sense leads one to conclude that it is virtually impossible for all employees to work in the same location in a large retail store setting. Indeed, in the retail setting, why is it important where employees physically work if they are all selling products and services of the employer?

Further, employees in virtually any situation, will be managed by different supervisors and be included in different organizational structures. Indeed, why is the employers organizational structure to be given much, if any, weight in unit determination proceeding – this is a factor that is more important to the employer and how it organizes its business and less of an interest to its employees.

Additionally, with few exceptions, employees generally do not regularly move throughout an employer's operation and have constant regular interchange with other employees when performing their assigned duties. Employees, as a general rule, work in their assigned area in the retail setting concentrating on selling the products and services in their immediate area. It does not make sense for a cosmetic and fragrance employee to be regularly helping a prospective customer try on a dress or a suit.

The Board and the Panel gave no weight to the highly relevant evidence in the record below that nine employees of the Macy's store had transferred into and out of the Cosmetics Department and that such transferees constituted nearly a quarter of the employees in the requested unit. This fact alone negates one of the Board's primary rationale to support its unit determination finding (i.e. the alleged lack of employee interchange).

Finally, the Board and the Panel gave little, if any, weight to the fact that the employees being sought by the union have the same benefits, are all engaged in selling of products of Macy's, have the same handbook, receive similar training, work the same schedules, attend the same daily briefing, are subject to same discipline and evaluation criteria, use the same entrances, share the same break rooms, and punch in and out using the same time cards. *Macy's*, 361 NLRB No. 4, slip op. at 24.

III. The Board's Application Of Its New Two Pronged *Specialty Healthcare* Test Violates Macy's Due Process and Equal Protection Rights, And The Panel failed To Address This Issue In Its Decision

The HR Policy Association's initial *Amicus Brief* to the Panel outlined the due process clause and equal protection clause deficiencies of the Board's new bargaining unit rule. The Panel failed to address these arguments. Simply stated, the Board's new *Specialty Healthcare* rule, when prongs one and two of such rule are combined, substantially deprive parties contesting petitioned-for units of their due process rights and equal protection rights under the Constitution.

Section 9(b) of the NLRA requires that the Board make determinations as to appropriate units for the purposes of collective bargaining. *Macy's*, slip op. at 10. This section of the Act makes no distinctions between petitioning parties and parties that oppose the scope of the petitioned-for unit. Labor organizations are not given any special status under section 9(b). Any party to a unit determination proceeding should have equal protection of the laws and due process rights regarding how section 9(b) is interpreted and applied. By imposing, albeit improperly, the overwhelming community of interest test on non-petitioning parties, but yet applying a totally different and relaxed standard for petitioning parties, the Board engages in classic discrimination and has failed to provide a reasoned explanation for such an approach. Stated alternatively, there is no "semblance of rationality" or fairness to what the Board has done in this area. As

stated above, it is virtually impossible for any party contesting a petitioned-for unit to prevail in its position. Employers, unions, and indeed, even employees are similarly situated in a bargaining unit determination, where the sole focus of analysis is the singular question of what is an appropriate grouping of employees for collective bargaining. As the Supreme Court stated in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985), "The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike." The Board's approach here does not come close to meeting that critical requirement of the Constitution.

Further, when a classification treats similarly situated individuals in a discriminatory manor, scrutiny is given to any such classification. Divergent approaches on classifications will not be held valid and will be found to be unconstitutional unless "there is a rational relationship between the disparity of the treatment and some legitimate government response." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Although courts are provided with some leeway in this area and are permitted to approve different treatment to different groups, a court is not to uphold different classification where there is no "semblance of rationality" *Baxstrom v. Herold*, 383 U.S. 107 (1966).

Here, not only is there no semblance of rationality, but inherent unfairness and unequal treatment as noted above on any party attempting to add employees to

a petitioned-for unit. Stated alternatively, what the Board has done in this case and in other applications of its new *Specialty Healthcare* doctrine, is to create a legal "hoax" wherein the petitioning party prevails in virtually any situation and the opposing party to such a petition can never prevail.

IV. The Board And The Courts Are Required To Consider The Impact Of Their Bargaining Unit Decisions On All Stakeholders To Board Proceedings, Including Employers

While there is no express provision in the Act requiring the Board to effectuate the Act's policy of efficient collective bargaining, the Supreme Court has held that "[a]s a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165, *reh'g denied*, 313 U.S. 599 (1941); *see also Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 175 (1971). Similarly, courts have recognized that "[i]n addition to explicit statutory limitations, a bargaining unit determination by the Board must effectuate the Act's policy of efficient collective bargaining." *NLRB v. Catherine McAuley Health Ctr.*, 885 F.2d 341, 344 (6th Cir. 1989).

The results of piece-meal unionization include inefficient collective bargaining. "It is costly for an employer to have to negotiate separately with a number of different unions, and the costs are not borne by the employer alone. The

different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing cost on other workers as well as on the employer's shareholders, creditors, suppliers, and customers." *Cont'l Web Press*, 742 F.2d. at 1090. For these reasons, "the Board cannot divide the work force into as many bargaining units as there are differentiable tasks." *Id.* At 1091-92.

Here, the Board and the Panel did not even purport to consider whether its new unit determination standard effectuates the Act's policy of efficient collective bargaining. Rather, its approach will create a state of "chaos rather than foster stable collective bargaining." *See Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134,139 (1962).

V. Conclusion

For the reasons outlined above, the Circuit court should grant Macy's application for *En Banc* rehearing.

Date: July 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 25th day of July, 2016, he caused the forgoing brief of *Amicus Curiae* HR Policy Association to be filed with the clerk of the United States Court of Appeals for the Fifth Circuit. The foregoing brief was also served upon the following counsel of record for the parties:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because this brief contains 3,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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